NO. 48636-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KEITH RATLIFF,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Mary Wilson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's right of self-representation.

2. Prosecutorial misconduct in closing argument denied appellant a fair trial.

3. This Court should exercise its discretion to deny appellate costs should the State substantially prevail on appeal.

Issues pertaining to assignments of error

1. Where the trial court denied appellant's timely request to proceed pro se without engaging in a colloquy to determine if the request was knowing and voluntary, was appellant denied his constitutional right of self-representation?

2. During closing argument the prosecutor relied on speculation and stereotypes about drug use and knowledge among the homeless population to challenge appellant's unwitting possession defense. Where there is a substantial likelihood this improper argument affected the verdict, must appellant's convictions be reversed?

3. Given the serious problems with the LFO system recognized by our Supreme Court in Blazina, should this Court exercise its discretion to deny cost bills filed in the cases of indigent appellants?

B. STATEMENT OF THE CASE

1. Procedural History

The Thurston County Prosecuting Attorney charged appellant Keith Ratliff with two counts of unlawful possession of a controlled substance. CP 23; RCW 69.50.4013(1). The case proceeded to jury trial before the Honorable Mary Sue Wilson, and the jury returned guilty verdicts. CP 151-52. The court imposed a standard range sentence of 18 months, with 12 months community custody, and Ratliff filed this timely appeal. CP 155, 178-79.

2. Substantive Facts

At 10:53 p.m. on June 18, 2015, Olympia Police Officer Paul Frailey observed Keith Ratliff lying on the sidewalk in downtown Olympia. 7RP[1] 61-62. Frailey advised Ratliff that it was illegal to lie on the sidewalk between 7:00 a.m. and midnight. 7RP 63. Frailey asked Ratliff to identify himself, and then he relayed that information to dispatch requesting a warrants check. 7RP 64. Dispatch informed Frailey that there was a warrant for Ratliff, and once dispatch confirmed the warrant, Frailey placed Ratliff under arrest. 7RP 64-65. In a search incident to arrest, Frailey discovered a one-inch plastic baggie with a very small

[1] The Verbatim Report of Proceedings is contained in eight volumes, designated as follows: 1RP—6-22-15, 12-17-15, 2-25-16; 2RP—7-7-15; 3RP—7-14-15; 4RP—8-31-15; 5RP—12-30-15 (am); 6RP—12-30-15 (pm), 2-18-16; 7RP—1-5-16; 8RP—1-6-16, 1-7-16.

amount of crystalline powder and a plastic wrapped package containing two half-pills. 7RP 67. The baggie was later determined contain methamphetamine and one of the half-pills was determined to contain oxycodone. 7RP 115, 120.

a. Ratliff's motion to waive the right to counsel

Some of the pretrial hearings were conducted by video conference, to which Ratliff objected. 2RP 3-4; 3RP 3. After continuing the arraignment for a week when Ratliff objected, on July 14, 2015, the court accommodated his request to appear in person to be arraigned. 2RP 4; 3RP 3-5. At his arraignment, Ratliff told the court he wanted to challenge the warrant on which his arrest was based. When the court told him to discuss proposed motions with his attorney, Ratliff said he wanted access to the law library. The court reiterated that he should talk to his attorney. 3RP 7-8.

Defense counsel subsequently filed a motion to suppress evidence discovered in the search incident to Ratliff's arrest, arguing that the municipal ordinance under which the police contacted Ratliff was unconstitutional. CP 4-13. At the suppression hearing on August 31, 2015, Ratliff interjected, saying he had questions for the witnesses. The court told him to confer with his attorney. He did so, and counsel had no further questions. 4RP 18, 29. During counsel's argument on the

suppression motion, Ratliff interjected that the court should consider the validity of the warrant as well as the constitutionality of the statute. 4RP 32. When counsel finished his argument, Ratliff told the court he also wanted to make a motion. The court told him he could not because he had an attorney, but Ratliff explained that he did not ask for an attorney. 4RP 42. When he tried to tell the court the basis for his motion, the court told him he needed to conduct himself appropriately, and he was not permitted to address the court because he was represented by counsel. 4RP 42-43.

On December 17, 2015, trial counsel informed the court that he had recently been appointed as substitute counsel, and Ratliff had a motion to go pro se. 1RP 6. Counsel explained that Ratliff wanted access to the jail's law library, and pro se defendants are given top priority. Moreover, Ratliff had made it clear that if going pro se was necessary to get access, that was what he wanted to do. He was asking to waive the right to counsel. 1RP 7. The court responded that it needed a colloquy with Ratliff for him to waive counsel, and there was no time for a colloquy that day. A hearing was scheduled for consideration of Ratliff's request. 1RP 8.

The hearing on Ratliff's motion to waive counsel was set for December 30, 2015, but Ratliff was not brought to court for the hearing. The court indicated that it would not have Ratliff brought to court based

on his prior interactions and pattern of disruptive behavior, and it asked the jail staff to have him available via video. 5RP 6. Defense counsel informed the court that Ratliff was requesting to appear in person and refusing to appear by video. The court denied his request. 6RP 3-4. The court explained that it was concerned for the safety and wellbeing of the individuals in the courtroom due to Ratliff's prior disruptive behavior and his assault of his previous attorney. 6RP 6-7. Ratliff asked if this ban from the courtroom would apply at trial as well, and the court responded that he would be permitted to attend the trial in person. When Ratliff asked why he then could not be in court for the present motion hearing, the court said it would not engage in that conversation with Ratliff. 6RP 9. Ratliff asked if he could continue the pro se motion until the morning of trial so that he could be present in court, and the court denied his request. 6RP 10. Through counsel, Ratliff informed the court he did not want to proceed with the motion hearing if he could not be in the courtroom. 6RP 10. The court then gave the basis for its ruling, noting that CrR 3.4(d) permits certain hearings to be held by video conference, giving the court discretion. 6RP 10-12.

On the morning of trial, January 5, 2016, Ratliff told the court he had issues to bring up. Counsel explained that Ratliff wanted to file a motion but first wanted to know if he would be allowed to proceed pro se.

7RP 5-6. Counsel told the court Ratliff continued to want access to the law library and also wanted to go pro se so he could raise several other issues. 7RP 13-14. Ratliff said he still wanted to contest the validity of the warrant, and he explained that he did not want to appear by video to argue his motion because his argument could be cut off by someone with a control switch and he would not be heard. 7RP 16-17.

The court refused to consider Ratliff's request to waive his right to counsel. It noted that when trial is about to commence, whether a defendant may represent himself depends on the circumstances of the case, and the court has quite a bit of discretion. Given Ratliff's history of disorderly conduct and his choice the previous week not to participate in the hearing scheduled on his motion, the court determined it was not appropriate for Ratliff to represent himself. 7RP 21. The case proceeded to trial at which Ratliff was represented by counsel.

When the State rested, Ratliff told the court he had complaints about defense counsel's representation and had no confidence in counsel's ability to try the case. 7RP 131. He again raised this issue at sentencing during his allocution, reminding the court he had not wanted a public defender and had wanted to go pro se. He said he did not feel counsel represented him properly at trial. 1RP 17-18.

b. Unwitting possession defense

At trial, Ratliff presented a defense of unwitting possession. He testified that, at the time of his arrest, he was wearing a jacket that he got while panhandling. The drugs were found in the pockets of the jacket, but he did not put them there and did not know they were there. He had found the one-inch baggie when he put his hands in the pockets, but he believed it was empty and only saved it because he planned to use it for marijuana. He never saw the two half-pills before the police removed them from the jacket. 7RP 140-42, 155-56, 158.

In cross examining Ratliff, the prosecutor questioned whether he had discovered the drugs in the jacket while looking for something to sell and held onto the baggie because of its financial value. Ratliff agreed that he was panhandling because he had no income, and he was looking for things of value. 7RP 158-59. He commented that he put his hands in the pockets of the jacket hoping to find a $100 bill. 7RP 160. He said he was familiar with the street environment and had done a lot of panhandling. 7RP 160. He was also familiar with marijuana. He testified, however, that he did not use any other drugs and would not be able to identify methamphetamine. 7RP 161, 165-66, 170. He was familiar with how to obtain marijuana in Olympia, and he would be able to panhandle the money needed to purchase it. 7RP 173-76. He did not think it would be

worth his time trying to trade something of value for money to buy marijuana, because he could panhandle the money easily. 7RP 177-78.

Officer Frailey testified in the State's rebuttal that he is familiar with the homeless population in Olympia, and he frequently comes across methamphetamine in his duties. 7RP 182. Most commonly he finds one-inch baggies with very small quantities of methamphetamine in them. 7RP 183. The contents of these "scraper bags" can be combined and used or sold, and thus the bags have value to addicts. 7RP 184. Half-pills are also commonly held and traded or sold among addicts. 7RP 185.

c. Prosecutor's closing argument

The prosecutor argued in closing that Ratliff knew the baggie in his possession contained methamphetamine and he kept it because it had value. She argued that because he was homeless and lived on the streets for years, he knew about controlled substances and their value, and his testimony that he had never seen any drugs other than marijuana was not reasonable. 8RP 228-31. She argued it was not reasonable to think that Ratliff wouldn't know a scraper bag had value after living on the street for 40 years. 8RP 236. The prosecutor argued that even if the jury believed Ratliff's testimony about how he got the jacket, all the other things he said were not reasonable in light of his history and testimony about the drug culture on the street, especially among the homeless population. 8RP 240-

41. In her rebuttal argument the prosecutor said that Ratliff lived on the streets through the 70s, 80s, and 90s, "the heyday for drugs in that population[,]" which informs his knowledge about substances, their value, and what to do with them. 8RP 252. She argued that Ratliff was aware the substances were there and he was aware what they were, and he retained them because they had value. 8RP 252-53. Defense counsel did not object to the prosecutor's arguments.

C. ARGUMENT

1. THE UNJUSTIFIED DENIAL OF RATLIFF'S RIGHT TO REPRESENT HIMSELF REQUIRES REVERSAL.

The state and federal constitutions guarantee a criminal defendant the right to self-representation. U.S. Const., amend. VI and XIV; Const., art. I § 22. In fact, a defendant "may conduct his entire defense without counsel if he so chooses." State v. Estabrook, 68 Wn. App. 309, 317 n. 3, 842 P.2d 1001(quoting State v. Harding, 161 Wash. 379, 383, 297 P. 167 (1931)), review denied, 121 Wn.2d 1024 (1993). The criminal defendant's right to defend is necessarily personal because the defendant will bear the personal consequences of a conviction should the defense fail. Faretta v. California, 422 U.S. 806, 820, 45 L. Ed. 2d 562, 95 S. Ct. 25254 (1975).

In Faretta, the Untied States Supreme Court discussed the nature of the right of self-representation. The court pointed out that the right to assistance of counsel, guaranteed by the sixth amendment, is not the same as "compulsory counsel." Faretta, 422 U.S. at 833. Counsel should function as an assistant to a willing defendant,

> not an organ of the state interposed between an unwilling defendant and his right to defend himself personally. . . . Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.

Faretta, 422 U.S. at 820-21. Thus, forcing a criminal defendant to accept, against his will, the services of a court appointed public defender, deprives the defendant of his constitutional right to conduct his own defense. Faretta, 422 U.S. at 836.

The constitutional right of self-representation is guaranteed despite the fact that exercise of that right "will almost surely result in detriment to both the defendant and the administration of justice." State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002), review denied 148 Wn.2d 1022 (2003). But the right is not absolute. The defendant must personally ask to exercise the right, and the request must be unequivocal, knowing and intelligent, and timely. Moreover, the right may not be exercised for the purpose of delaying the trial or obstructing justice. Id. The usual

method a court uses to evaluate a pro se motion is colloquy with the defendant. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010).

The court below never conducted a colloquy with Ratliff before denying his request to represent himself. When the request was first made on December 17, 2015, the court noted that a colloquy was required but there was no time for one that day. A hearing was scheduled for December 30, 2015, to consider Ratliff's motion. If the court is reasonably unprepared to immediately respond to the defendant's request, it may delay its ruling. Madsen, 168 Wn.2d at 504. It was not improper for the court to defer its consideration of Ratliff's motion at that point.

At the hearing scheduled for consideration of the motion, however, the court refused to allow Ratliff to appear in person. The court ruled that it was exercising its discretion under CrR 3.4 to conduct a video proceeding due to Ratliff's previous disruptive behavior and his assault on former counsel. While the court's duties of maintaining the courtroom and the orderly administration of justice are important, the right of self-representation is a fundamental right guaranteed by the state and federal constitutions. The value of respecting this right outweighs resulting difficulty in the administration of justice. Madsen, 168 Wn.2d at 509. Ratliff's previous behavior had been disruptive, but his disruptions were prompted by what he saw as counsel's failure to raise issues he wanted the

court to decide. He did not ask for a continuance; he asked only to be permitted to represent himself and for access to the jail law library. There is no indication Ratliff's goal was merely to be disruptive and delay the proceedings. See Madsen, 168 Wn.2d at 509 (Defendant's disruptive behavior did not justify denial of pro se status where he was trying to address substantive issues he thought were unresolved by the court). Moreover, the court had made it clear that it did not consider Ratliff's presence so disruptive or dangerous that it was necessary to exclude him from the courtroom for all purposes. It was allowing him to be present for trial. Had the court given due importance to Ratliff's fundamental right to represent himself, it would have allowed Ratliff to present his motion in person, despite the concerns about disorder in the courtroom. Its unreasonable failure to do so was an abuse of discretion.

The next opportunity for Ratliff to appear in person was the day of trial, January 5, 2015, at which time he renewed his motion to proceed pro se. He told the court he still wanted access to the law library and he wanted to represent himself because he had a number of issues he wanted to raise. The court denied the motion, again noting that Ratliff had previously been disruptive and stating that Ratliff had chosen not to participate in the scheduled hearing on his motion the previous week.

While the court must indulge every reasonable presumption against waiver of the right to counsel, it may only deny a defendant's request for self-representation on a finding that the request is equivocal, untimely, involuntary, or made without general understanding of the consequences. Moreover, such finding must be based on identifiable fact. Madsen, 168 Wn.2d at 504-05. A court may not deny a motion for self-representation based on concerns that the proceedings would be less orderly and efficient than if the defendant were represented by counsel. Madsen, 168 Wn.2d at 505.

As discussed above, Ratliff's previous disruptive behavior, in an attempt to address substantive issues he believed were unresolved, did not justify denial of his right of self-representation. And Ratliff's absence from the previous hearing on his motion was due to the court's unreasonable exclusion of him from the courtroom. Ratliff's motion on the day of trial was merely the renewal of his motion first raised three weeks earlier, which the court had not yet addressed. When the court is put on notice of a defendant's desire to proceed pro se but nevertheless delays ruling on the motion, fairness requires timeliness to be measured from the date of the initial request. Madsen, 168 Wn.2d at 508 (citing State v. Breedlove, 79 Wn. App. 101, 109, 900 P.2d 586 (1995)). Measured from the day the request was first made, rather than from when

it was renewed on the day of trial, Ratliff's motion to proceed pro se could not properly be rejected as untimely. Ratliff unequivocally requested to represent himself, and the court never conducted a colloquy with Ratliff to determine if the request was knowing, intelligent, and voluntary. The court's ruling unjustly denied him his right of self-representation.

The right to self-representation is either respected or denied; its deprivation cannot be harmless. Vermillion, 112 Wn. App. at 851 (citing McKaskle v. Wiggins, 465 U.S. 168, 177 n.8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)). Thus, the unjustified denial of a defendant's right of self-representation requires reversal; no showing of prejudice is required. Madsen, 168 Wn.2d at 504; Estabrook, 68 Wn. App. at 317. Ratliff's convictions must be reversed.

2. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED RATLIFF A FAIR TRIAL.

A prosecutor is a quasi-judicial officer who has a duty to ensure a defendant in a criminal prosecution is given a fair trial. State v. Carlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

> A prosecutor serves two important functions: A prosecutor must enforce the law by prosecuting those who have violated the peace

> and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Id. The prosecutor owes a duty to criminal defendants to see that their rights to a constitutionally fair trial are not violated. Id. When a prosecutor commits misconduct, she may deny the accused a fair trial. Id.

"A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). The prosecutor is therefore forbidden from appealing to the passions of the jury and thereby encouraging it to render a verdict based on emotion rather than properly admitted evidence. Viereck v. United States, 318 U.S. 236, 247-48, 63 S. Ct. 561, 87 L.Ed.2d 734 (1943); State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

Prosecutorial misconduct violates the defendant's right to a fair trial and requires reversal when the prosecutor's argument was improper and there is a substantial likelihood the misconduct affected the verdict. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). Even when there was no objection to the argument at trial, reversal is required when the misconduct was so flagrant and ill intentioned as to be incurable by instruction. Id. In general, arguments that have an inflammatory effect on the jury are not curable by instruction.

State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158, review denied, 175 Wn.2d 1025 (2012).

In Monday, the prosecutor argued that the reason witness after witness denied that the defendant was guilty was the existence of a "code" that "black folk don't testify against black folk." Monday, 171 Wn.2d at 674. The prosecutor returned to this theme throughout his argument. Id. This argument improperly injected racial prejudice into the proceedings in an attempt to discount unfavorable testimony, prejudicing the defendant's right to a fair trial. Id. at 678-80.

Similarly, in this case, the prosecutor relied on speculation and bias about the homeless population to discredit Ratliff's testimony. The prosecutor argued that Ratliff had to know that the plastic baggie found in his pocket contained methamphetamine, and that he retained it knowing the contents had value, because he was homeless. 8RP 236, 240-41. She argued that Ratliff's sworn testimony that he had never seen or used any drug except marijuana was unreasonable because, by his own admission, he had lived on the streets for over 40 years. 8RP 229-31. She told the jury that Ratliff lived on the streets through "the heyday for drugs in that population." 8RP 252.

This argument was not based on facts in the record but on unsupported assumptions and stereotypes about the homeless population.

Although the State presented testimony from a police officer that he frequently encounters scraper bags of methamphetamine among the homeless population, this testimony is a far cry from establishing that every homeless person would recognize and know the value of a scraper bag. There was no testimony to support the argument that a homeless person familiar with marijuana would necessarily be familiar with and able to identify methamphetamine as well. A prosecutor's latitude in closing argument is limited to arguments "based on probative evidence and sound reason." Glasmann, 175 Wn.2d at 704 (quoting State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)). Rather than arguing reasonable inferences from the evidence, the prosecutor here was speculating about what the homeless population must know. This argument appealed to the passions and prejudices of the jury and constituted misconduct.

Prosecutorial misconduct may require reversal even where ample evidence supports the jury's verdict. Glasmann, 175 Wn.2d at 711-12. The focus of the reviewing court's inquiry "must be on the misconduct and its impact, not on the evidence that was properly admitted." Id. at 711. This misconduct here prejudiced Ratliff. Whether his possession of the substances was unwitting was the only issue at trial. The prosecutor's speculation and bias supplied the jury with the explanation that, because

Ratliff was homeless and had lived on the street during the heyday of drugs in that population, he was necessarily exposed to all types of controlled substances; he therefore must have recognized that the baggie he found contained methamphetamine. Once implanted in the jurors' minds, a curative instruction could not likely dislodge this explanation. There is a substantial likelihood this misconduct affected the verdict, and Ratliff's convictions must be reversed.

3. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DECLINE TO IMPOSE APPELLATE COSTS.

The trial court entered an order of indigency finding that Ratliff was entitled to seek appellate review wholly at public expense, including appointed counsel, filing fees, costs of preparation of briefs, and costs of preparation of the verbatim report of proceedings. CP 172-73. In addition, the trial court found Ratliff was unlikely to have the ability to pay LFOs in the future and imposed only the mandatory LFOs. 1RP 19.

a. **The serious problems *Blazina* recognized apply equally to costs awarded on appeal, and this Court should exercise its discretion to deny cost bills filed in the cases of indigent appellants.**

Our supreme court in Blazina recognized the "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue interest at a rate of 12 percent so that even persons

"who pay[] $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." Id. This, in turn, "means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." Id. "The court's long-term involvement in defendants' lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." Id. (citing AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS, at 68-69 (2010), available at https://www.aclu.org/files/assets/InForAPenny_web.pdf; KATHERINE A. BECKETT, ALEXES M. HARRIS, & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM'N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE, at 9-11, 21-22, 43, 68 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf).

To confront these serious problems, our supreme court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." Blazina, 182 Wn.2d at 834. Only by conducting such a "case-by-case

analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

The Blazina court addressed LFOs imposed by trial courts, but the "problematic consequences" are every bit as problematic with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants' ability to move on with their lives in precisely the same ways the Blazina court identified.

Although Blazina applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene Blazina's reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that Blazina held was essential before including monetary obligations in the judgment and sentence.

Ratliff has been determined to qualify for indigent defense services on appeal. To require him to pay appellate costs without determining his

financial circumstances would transform the thoughtful and independent judiciary to which the Blazina court aspired into a perfunctory rubber stamp for the executive branch.

In addition, the prior rationale in State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of Blazina. The Blank court did not require inquiry into an indigent appellant's ability to pay at the time costs are imposed because ability to pay would be considered at the time the State attempted to collect the costs. Blank, 131 Wn.2d at 244, 246, 252-53. But this time-of-enforcement rationale does not account for Blazina's recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship. Blazina, 182 Wn.2d at 836; see also RCW 10.82.090(1) ("[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments."). Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); State v. Mahone, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, "Mahone cannot receive counsel at public expense"). Expecting indigent defendants to shield themselves from the State's collection efforts or to petition for

remission without the assistance of counsel is neither fair nor realistic. The Blazina court also expressly rejected the State's ripeness claim that "the proper time to challenge the imposition of an LFO arises when the State seeks to collect." Blazina, 182 Wn.2d at 832, n.1. Blank's questionable foundation has been thoroughly undermined by the Blazina court's exposure of the stark and troubling reality of LFO enforcement in Washington.

Furthermore, the Blazina court instructed *all* courts to "look to the comment in GR 34 for guidance." Blazina, 182 Wn.2d at 838. That comment provides, "The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The Blazina court also suggested, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." Blazina, 182 Wn.2d at 839. This court receives orders of indigency "as a part of the record on review." RAP 15.2(e). "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this

court to "seriously question" an indigent appellant's ability to pay costs assessed in an appellate cost bill. Blazina, 182 Wn.2d at 839.

This court has ample discretion to deny cost bills. RCW 10.73.160(1) states the "court of appeals . . . *may* require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Blank, too, acknowledged appellate courts have discretion to deny the State's requests for costs. 131 Wn.2d at 252-53. Given the serious concerns recognized in Blazina, this court should soundly exercise its discretion by denying the State's requests for appellate costs in appeals involving indigent appellants, barring reasonable efforts by the State to rebut the presumption of continued indigency. Ratliff respectfully requests that this court deny a cost bill in this case should the State substantially prevail on appeal.

b. **Alternatively, this court should remand for superior court fact-finding to determine Ratliff's ability to pay.**

In the event this court is inclined to impose appellate costs on Ratliff should the State substantially prevail on appeal, he requests remand for a fair pre-imposition fact-finding hearing at which he can present evidence of his inability to pay. Consideration of ability to pay before imposition would at least ameliorate the substantial burden of

compounded interest. At any such hearing, this court should direct the superior court to appoint counsel for Ratliff to assist him in developing a record and litigating his ability to pay.

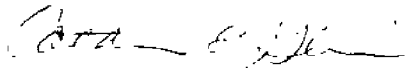
If the State is able to overcome the presumption of continued indigence and support a finding that Ratliff has the ability to pay, this court could then fairly exercise its discretion to impose all or a portion of the State's requested costs, depending on his actual and documented ability to pay.

D. CONCLUSION

For the reasons argued above, this Court should reverse Ratliff's convictions. This Court should also decline to impose appellate costs should the State substantially prevail on appeal.

DATED August 18, 2016.

Respectfully submitted,



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Certification of Service by Mail

Today I caused to be mailed a copy of the Brief of Appellant in *State v. Keith Ratliff,* Cause No. 48636-9-III as follows:

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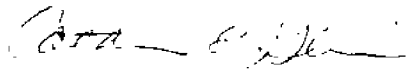
Walla Walla, WA 99362

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
August 18, 2016

GLINSKI LAW FIRM PLLC

August 18, 2016 - 3:31 PM

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Case Name:

Court of Appeals Case Number: 48636-9

Is this a Personal Restraint Petition? Yes ■ No

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

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Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

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Other: _____

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